

Sexual Orientation and Gender Identity

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As 2009 began, those fighting discrimination based on sexual orientation were cautiously optimistic. A month earlier, in December 2008, sixty-six Member States of the United Nations General Assembly, including Canada, the European Union's Member States, Australia, and Japan, adopted a declaration condemning human rights violations based on homophobia.¹ It marked the first time a declaration supportive of gay rights was introduced before the General Assembly.² Although the United States initially opposed the declaration, the Obama administration reversed course and in March, the State Department announced that the United States would join the rest of the Western world in supporting the statement.³

A year later, that initial optimism has been tempered by the resurgence of homophobic legislation in many countries across the globe and an increase in violence against sexual minorities.⁴ This dramatic escalation was the focus of a U.N. General Assembly panel convened in December.⁵ The panel, organized by Sweden in collaboration with Argentina, Brazil, Croatia, France, The Netherlands, and Norway, was attended by hundreds of delegates and featured speakers from across the globe.⁶ The meeting was described as ground-breaking, in part because a representative of the Holy See issued a statement opposing the criminalization of homosexual conduct.⁷ The statement noted that the Holy See "opposes all forms of violence and unjust discrimination against homosexual persons, including discriminatory penal legislation which undermines the inherent dignity of the

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1. Neil MacFarquhar, *In a First, Gay Rights Are Pressed at the U.N.*, N.Y. TIMES, Dec. 18, 2008, <http://www.nytimes.com/2008/12/19/world/19nations.html>; Sue Fleming, *In Turn-Around, U.S. Signs U.N. Gay Rights Document*, REUTERS, Mar. 18, 2009, <http://www.reuters.com/article/idUSTRE52H5CK20090318>.

2. MacFarquhar, *supra* note 1.

3. Fleming, *supra* note 1.

4. Press Release, International Gay and Lesbian Human Rights Commission, United Nations: Landmark Meeting Denounces Rights Abuses Based on Sexual Orientation, Gender Identity (Dec. 11, 2009), <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1043.html>.

5. *Id.*

6. *Id.*

7. *Id.*

human person. . . . [T]he murder and abuse of homosexual persons are to be confronted on all levels, especially when such violence is perpetrated by the State.”⁸ Unfortunately, as the survey below indicates, 2009 is replete with examples of the sorts of abuses that prompted the Holy See’s statement as well as the concern of human rights activists everywhere.

I. Discrimination and Violence

Acts of discrimination and violence based on sexual orientation and gender identity took place around the world. The reports here represent significant legal developments during 2009 from Botswana, Burundi, India, Indonesia, Iraq, Jamaica, Mongolia, the Philippines, Rwanda, Turkey, Uganda, and the United States.

A. BOTSWANA

Two members of the non-governmental organization (NGO) Lesbians, Gays, and Bisexuals of Botswana (Legabibo) served notice that they intended to sue the State in an attempt to have Section 164 of the Botswana Penal Code declared unconstitutional.⁹ Section 164 criminalizes homosexual conduct.¹⁰ A previous court challenge was rejected “in 2003, when a Botswana appeals court ruled that the country was not ready to accept homosexuality.”¹¹ Also at issue is the government’s decision to deny Legabibo’s application to register as an NGO, thereby making it illegal for the organization to operate in Botswana.¹² The government has indicated that it will vigorously oppose attempts to repeal the challenged provisions.¹³

B. BURUNDI

In April 2009, the East African nation of Burundi passed legislation that institutionalized discrimination against homosexuals.¹⁴ Article 567 of the newly adopted Penal Code of Burundi had been initially rejected by the Senate in the wake of widespread international outrage.¹⁵ President Nkurunziza (who believes that homosexuality is “a curse”) and his ruling party organized mass demonstrations condemning homosexuality and vehemently pushed for passage of the legislation that was subsequently adopted by the Na-

8. *Id.*

9. Nthateng Mhlambiso, *Government to Meet Botswana Homosexuals in Court*, BEHIND THE MASK, May 21, 2009, <http://www.globalgayz.com/country/Botswana/view/BWA/gay-botswana-news-and-reports#article7>.

10. *Id.*

11. *Members of a Banned Organization Are Suing the Government*, GLOBALGAYZ.COM, Apr. 30, 2009, <http://www.globalgayz.com/country/Botswana/view/BWA/gay-botswana-news-and-reports#article7>.

12. Oliver Modise, “*We Will Meet in Court*” [Government] Tells Bisexuals, MMEGI/THE REPORTER (BOTS.), May 15, 2009, available at 2009 WLNR 9451996.

13. *Id.*

14. *See Burundian Homosexuals Suffer under New Anti-Gay Law*, VOICE OF AMERICA, Aug. 3, 2009, available at 2009 WLNR 14981348.

15. *See Burundi: Senate Upholds Human Rights Principles*, International Gay and Lesbian Human Rights Commission, Feb. 20, 2009, <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/863.html>.

tional Assembly.¹⁶ The new law provides that “whoever has sexual relations with a person of the same sex is punished by a prison sentence of three months to two years and a fine of 50,000 to 100,000 francs, or one of these penalties.”¹⁷ Human Rights Watch has documented the increased persecution suffered by members of the lesbian, gay, bisexual, and transgender (LGBT) community in Burundi by collecting narratives, photos, and voice-recorded testimonies of individuals who have been fired from their jobs, suffered physical abuse at the hands of relatives and strangers, and been thrown out of their homes.¹⁸

C. INDIA

In one of the defining moments of gay rights law in 2009, the High Court of Delhi struck Section 377 of the Indian Penal Code, which had criminalized homosexual conduct, and declared it unconstitutional.¹⁹ In its ruling, the High Court emphasized that “[m]oral indignation, howsoever strong, is not a valid basis for overriding individuals’ fundamental rights of dignity and privacy. In our scheme of things Constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view[.]”²⁰ The Naz Foundation, an Indian NGO that was a party to the lawsuit, noted that while the Court’s ruling did not legalize homosexuality, it provided tangible evidence that “finally India has entered the 21st century.”²¹

In striking down the discriminatory provisions of the Penal Code, the High Court acknowledged that:

[T]he criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery A provision of law branding one section of people as criminal based wholly on the State’s moral disapproval of that class goes counter to the equality guaranteed [under the Indian Constitution].²²

Although the High Court of Delhi’s jurisdiction extends only over the Union Territory of Delhi,²³ “the Supreme Court of India has made clear in recent decisions that a ruling of this sort by the High Court of any province or state on a constitutional question of first

16. See *Forbidden: Institutionalizing Discrimination against Gays and Lesbians in Burundi*, HUMAN RIGHTS WATCH, July 29, 2009, <http://www.hrw.org/en/node/84598/section/2>.

17. See *Petition from Burundian and International Human Rights NGOs on the Criminalization of Homosexuality in Burundi*, International Gay and Lesbian Human Rights Commission, Apr. 25, 2009, <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/907.html>.

18. See generally *Forbidden: Institutionalizing Discrimination against Gays and Lesbians in Burundi*, *supra* note 16.

19. Jyoti Thottam, *India’s Historic Ruling on Gay Rights*, TIME, Jul. 2, 2009, <http://www.time.com/time/world/article/0,8599,1908406,00.html>.

20. *Id.*

21. Press Release, Amnesty International, India’s Ruling Against ‘Sodomy’ Laws Is First Step to Equality (July 3, 2009), available at <http://www.amnesty.org/en/news-and-updates/news/india-ruling-against-sodomy-laws-first-step-equality-20090703>.

22. *New Delhi Court De-criminalizes Consensual Homosexual Acts in a Ground-breaking and Controversial Ruling in the Conservative Indian Capital*, ILGA, June 30, 2009, http://old.ilga.org/news_results.asp?FileCategory=1&ZoneID=3&FileID=1267.

23. Delhi High Court, <http://delhihighcourt.nic.in/>.

impression will have national application unless reversed or modified by the Supreme Court.²⁴ As of this writing, there was no indication that the Supreme Court was set to reverse the decision.

D. INDONESIA

In September 2009, the parliament of Aceh Province (a semi-autonomous special territory of Indonesia that has implemented Shari'ah law) unanimously passed new legislation that imposes severe penalties for homosexual conduct, including long prison terms and caning of up to 100 lashes.²⁵ The law (Law No. 11/2006 of the Government of Aceh) has been widely condemned by human rights organizations because, among other things, it also endorses stoning to death as a penalty for adultery.²⁶ In response to international pressure as well as internal opposition, Aceh's governor has refused to sign the legislation.²⁷ As of this writing, there is still debate as to whether the law can take effect without the governor's signature or whether it became effective, notwithstanding the governor's objection, thirty days after its enactment.²⁸ A newly elected legislative council is reportedly eager to revisit the legislation and representatives of law enforcement agencies in Aceh have conceded that the legislation, as written, "would be difficult to implement" because there is no uniform understanding of how its terms should be interpreted.²⁹

E. IRAQ

Violence against LGBT individuals in Iraq surged in 2009, six years after the U.S. invasion of the country. Human Rights Watch published a report in August 2009 documenting extrajudicial executions, kidnappings, and torture of gay men that began primarily in the Sadr City area of Baghdad.³⁰ In response to recent acts by private militias, U.S. Ambassador to Iraq Christopher Hill has requested that the Iraqi Ministry of Interior "investigate any and all allegations that Iraqi security forces were in any way in-

24. *Gays of India Win Liberation From Archaic Sodomy Law*, Lesbian/Gay Law Notes, July/Aug. 2009, http://www.nyls.edu/user_files/11/3/4/30/59/65/66/ln0907.pdf.

25. *See Aceh Passes Adultery Stoning Law*, BBC NEWS, Sept. 14, 2009, available at <http://news.bbc.co.uk/2/hi/8254631.stm>; *Indonesia Must Repeal "Cruel" New Stoning and Caning Law*, AMNESTY INT'L, Sept. 17, 2009, available at <http://www.amnesty.org/en/news-and-updates/news/indonesia-must-repeal-cruel-new-stoning-caning-law-20090917>; *Indonesia's Aceh Passes Stoning Law*, ALJAZEERA.NET, Sept. 14, 2009, available at 2009 WLNR 18043833.

26. *See, e.g., Indonesia Must Repeal "Cruel" New Stoning and Caning Law*, *supra* note 25; *Indonesia: New Aceh Law Imposes Torture*, *supra* note 25.

27. *Aceh Parliament Revises Stoning Bylaw*, ISLAMONLINE.NET, Oct. 23, 2009, available at http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1256033923832&pagename=Zone-English-News%2FNWELayout.

28. *Camelia Pasandaran, Standoff Over Aceh Stoning Legislation*, JAKARTA GLOBE, Oct. 25, 2009, <http://thejakartaglobe.com/home/standoff-over-aceh-stoning-legislation/337621>.

29. *Nurdin Hasan, To Stone or Not to Stone: It's a Matter of Interpretation, Say Aceh Authorities*, JAKARTA GLOBE, Nov. 23, 2009, <http://thejakartaglobe.com/home/to-stone-or-not-to-stone-its-matter-of-interpretation-say-aceh-authorities/343240>.

30. HUMAN RIGHTS WATCH, *THEY WANT US EXTERMINATED: MURDER, TORTURE, SEXUAL ORIENTATION AND GENDER IN IRAQ* (2009), <http://www.hrw.org/sites/default/files/reports/iraq0809web.pdf>.

volved in these attacks.”³¹ Although there are no official figures regarding the number of victims, a U.N. worker estimated that they “could number in the hundreds.”³²

F. JAMAICA

In September, the strangled corpse of Britain’s honorary counsel was found alongside a note denouncing him as a homosexual; the murder served as a harsh reminder of the homophobic violence that permeates much of Jamaica.³³ A local NGO, The Jamaica Forum for Lesbians, Bi-Sexuals, and Gays, reported dozens of cases in which members of the LGBT community were seriously injured as a result of mob attacks.³⁴ In Jamaica, homosexual conduct is punishable with up to ten years of hard labor.³⁵ Attempts are currently under way to reform legislation governing sexual conduct, however, both the majority and opposition parties, under pressure from religious and other groups, have made it clear they will oppose any attempt to weaken laws that criminalize gay sex.³⁶

G. MONGOLIA

In July, the Lesbian, Gay, Bisexual, and Transgender Center of Mongolia was denied the right to operate legally when the State Registration General Agency denied the NGO’s registration application.³⁷ The Agency justified its refusal to register the organization by claiming “the name ‘Lesbian, Gay, Bisexual and Transgender Centre’ has a meaning that conflicts with Mongolian customs and traditions and has the potential to set the wrong example for youth and adolescents.”³⁸ As pointed out by Human Rights Watch, the rejection violates the Constitution of Mongolia’s guarantee that all citizens shall have the right “to form . . . public organizations and to unite voluntarily in associations according to social and personal interests and opinion.”³⁹ The denial also violates Article 7 of the Declaration on Human Rights Defenders that provides that “everyone has the right, individually and in association with others to develop and discuss new human rights ideas and principles and advocate their acceptance.”⁴⁰ A 2007 report of the U.N.

31. Letter from Christopher Hill, U.S. Ambassador, to Mark Bromley, Chair of The Council for Global Equality (July 13, 2009), available at <http://www.globalequality.org/storage/cfge/documents/amb.%20hill%20response%20tr%20iraq%20july%2013,2009.pdf>.

32. Rasha Moumnch, *Iraq’s New Surge: Gay Killings*, FOREIGN POLICY, Sept. 9, 2009, http://www.foreignpolicy.com/articles/2009/09/09/iraqs_new_surge_gay_killings.

33. *Homophobia in Jamaica: A Vicious Intolerance*, ECONOMIST, Sept. 19, 2009, available at 2009 WLNR 18292932.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Mongolia Rebuffs Lesbian, Gay, Bisexual, and Transgender Organization*, HUMAN RIGHTS WATCH, July 9, 2009, <http://www.hrw.org/en/news/2009/07/09/mongolia-rebuffs-lesbian-gay-bisexual-and-transgender-organization>.

38. Letter from Dipika Nath, Human Rights Watch, to Minister Nyamdorj, Minister of Justice and Home Affairs of Mongolia (July 9, 2009) (quoting rejection letter of June 23, 2009 (no.7/694)), available at <http://www.hrw.org/en/news/2009/07/09/letter-minister-justice-and-home-affairs-mongolia>.

39. *Id.* (quoting MONG. CONST. art. XVI, ¶ 10).

40. *Id.*

Special Representative on human rights defenders has specifically highlighted the denial of registration to LGBT organizations as a human rights violation.⁴¹

H. PHILIPPINES

Ang Ladlad, an organization representing the interests of the Filipino LGBT community, was denied the ability to register as a political party, resulting in its inability to participate in the country's 2010 elections.⁴² The Philippine Commission on Elections based its decision to reject Ang Ladlad's petition to register "on religious grounds and unsubstantiated claims that granting the petition would 'compromise the well-being of the greater number of [the Filipino] people, especially the youth.'"⁴³ The denial was condemned by the country director for the U.N. Development Programme, who noted that it "violate[d] the rights of gays, lesbians, and transgender" individuals.⁴⁴

I. RWANDA

Rwanda's lower house of parliament was scheduled to hold its final debate December 16, 2009, on legislation that would criminalize homosexual sex and promotion of homosexuality.⁴⁵ The revision of the penal code would criminalize "any person who practices, encourages or sensitizes people of the same sex, to sexual relation or any sexual practice," and violators would be subject to imprisonment of up to ten years, a fine of up to \$1,750, or both.⁴⁶ If passed in the lower house, the Rwandan Senate will consider the legislation in early 2010.⁴⁷

J. TURKEY

Turkey's Supreme Court of Appeals reversed a 2008 decision by a local court in Istanbul ordering the closure of Lambda Istanbul, a local LGBT organization.⁴⁸ The case was sent back to the local court and, in April 2009, the organization was granted permission to continue operating.⁴⁹ Although applauding the court's decision, the organization issued a statement calling for greater guarantees for Turkey's LGBT community, including a constitutional amendment banning discrimination on the basis of sexual orientation.⁵⁰ The organization emphasized that a "constitutional safeguard is a must to hinder any

41. *Id.*

42. *Philippines: Let LGBT Party Contest Elections*, HUMAN RIGHTS WATCH, Nov. 25, 2009, <http://www.hrw.org/en/news/2009/11/25/philippines-let-lgbt-party-contest-elections>.

43. *Id.*

44. Llanesca T. Panti & Ira Karen Apanay, *Gays, Massacre Highlight Rights Challenges*, MANILA TIMES, Dec. 11, 2009, available at 2009 WLNR 25161809.

45. Christopher Mangum, *Rwanda Debates Criminalizing Gay Sex*, ADVOCATE.COM, Dec. 16 2009, http://www.advocate.com/News/Daily_News/2009/12/16/Rwanda_Debates_Criminalizing_Homosexuality/.

46. *Id.*

47. *Id.*

48. *Turkish LGBT Organization Wins Appeal Against Closure*, AMNESTY INT'L., Jan. 21, 2009, <http://www.amnestyusa.org/document.php?lang=e&id=ENGNAU200901219075>.

49. Rex Wockner, *Court: Lambda Istanbul Can Continue Operating*, WORLD NEWS BRIEFS, May 7, 2009, <http://www.gaylesbiantimes.com/?id=14596>.

50. *Id.*

homophobic interpretations of those vague concepts in law such as 'general morals' or 'social values' by barristers, who suffer from the very same social prejudices as many others in society."⁵¹

K. UGANDA

Gay and lesbian persons face serious discrimination around the world from both governmental and private sources. One of the most pernicious acts came in 2009 from the nation of Uganda, where proposed anti-gay legislation would impose lifetime imprisonment for anyone convicted of homosexuality and the death penalty would be imposed on any "serial" offenders.⁵² A person commits "the offence of homosexuality" under the proposed Ugandan legislation if he or she merely "touches another person with the intention of committing the act of homosexuality."⁵³ A touch could thus subject someone to life imprisonment.⁵⁴ "Aggravated homosexuality," such as being a "serial offender,"⁵⁵ is subject to the death penalty.⁵⁶ "Aggravated homosexuality," is defined under the proposed law to also include a consensual act involving an HIV-positive individual, a minor, an individual with a disability, a parent or guardian of the "victim," or drug use.⁵⁷ Any of those crimes would subject a person to death if the law passes. Aiding and abetting an offender who participates in acts of homosexuality could carry a prison term of seven years.⁵⁸ Although Uganda is not alone in criminalizing homosexuality or homosexual activity (thirty-seven other nations in Africa alone also do so),⁵⁹ this is one of the most extreme legislative attempts at criminalization proposed anywhere in recent years.

An attempt to commit the offense of homosexuality would be subject to imprisonment of seven years⁶⁰ and an attempt to commit aggravated homosexuality would be subject to life imprisonment.⁶¹ A person who enters into a same-sex marriage is also subject to life imprisonment under the proposed Ugandan legislation.⁶² And any person in authority⁶³ who fails to report an instance of homosexual behavior within twenty-four hours may be

51. *Id.*

52. Anti Homosexuality Bill 2009, Bill No. 18 (2009) (Uganda) [hereinafter Anti Homosexuality Bill 2009], available at <http://www.boxturtlebulletin.com/btb/wp-content/uploads/2009/10/Bill-No-18-Anti-Homosexuality-Bill-2009.pdf>.

53. *Id.* § 2(1)(c).

54. *Id.* § 2(2).

55. *Id.* § 3(1)(f).

56. *Id.* § 3(2).

57. *Id.*

58. *Id.*

59. DANIEL OTTOSON, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME-SEX ACTIVITY BETWEEN CONSENTING ADULTS (2009), available at http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf.

60. Anti Homosexuality Bill 2009, § 4(1).

61. *Id.* § 4(2).

62. *Id.* § 12.

63. "Authority" is defined in the proposed legislation as "having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious, political, economic or social authority." *Id.* § 1.

fined and imprisoned for up to three years.⁶⁴ As of this writing, Uganda was expected to pass its "kill-the-gays"⁶⁵ legislation.

L. UNITED STATES

Crimes of violence motivated by the victim's perceived sexual orientation or gender identity were seen around the world during 2009. In Puerto Rico, a nineteen-year-old gay student was found by the side of the road burned, decapitated, and with all of his limbs dismembered.⁶⁶

There have been over 16,000 hate crimes based on sexual orientation and gender identity in the United States since 1998.⁶⁷ The United States has started collecting data on bias-motivated crimes on the basis of ethnicity, race, religion, disability, sexual orientation, and gender identity.⁶⁸ Because reporting of hate crimes is still in its early stages and not yet uniform across the country, the Federal Bureau of Investigation cautions against using the data to identify any trends from year to year.⁶⁹ Data reported in 2009 for the period of 2007-08 showed an increase of two percent in bias-motivated incidents and in the number of crime victims, but an eleven percent increase in the number of hate crimes motivated by the victim's sexual orientation and/or gender identity.⁷⁰

President Obama signed the Matthew Shepard and James Bryd, Jr. Hate Crimes Prevention Act on October 28, 2009,⁷¹ marking the first U.S. federal statute guaranteeing any rights to gay, lesbian, and transgender persons.⁷² The new law added sexual orientation and gender identity to the federal hate crime statute, which previously covered crimes motivated by the victim's actual or perceived race, color, religion, or national origin.⁷³

II. Same-Sex Marriage and Civil Unions

The year 2009 was a momentous year for LGBT relationship recognition. In the United States: Iowa,⁷⁴ New Hampshire,⁷⁵ and Vermont⁷⁶ joined Massachusetts⁷⁷ and

64. *Id.* § 14.

65. The term "kill-the-gays bill" was popularized by Rachel Maddow, the MSNBC journalist, who has been instrumental in raising awareness about the gross human rights violations that would result from passage of the proposed legislation. See, e.g., The Rachel Maddow Show (Dec. 11, 2009), available at 2009 WLNR 25069669 ("the kill-the-gays bill, now pending in Uganda, has many connections to conservative politicians and anti-gay activists in the U.S.").

66. Malcolm Lazin, *Stop the Slaughter!*, WINDY CITY TIMES, Dec. 2, 2009, <http://www.windycitymediagroup.com/images/publications/wct/2009-12-02/current.pdf>.

67. *Id.*

68. See, e.g., Samuel Worley, *FBI: Hate Crimes on the Rise*, WINDY CITY TIMES, Dec. 2, 2009, at 8, available at <http://www.windycitymediagroup.com/images/publications/wct/2009-12-02/current.pdf>.

69. *Id.*

70. See Lazin, *supra* note 66, at 8; Worley, *supra* note 68, at 1.

71. Jeff Zeleny, *Obama Signs Hate Crimes Bill*, N.Y. TIMES, Oct. 28, 2009, <http://thecaucus.blogs.nytimes.com/2009/10/28/obama-signs-hate-crimes-bill/>.

72. Press Release, Lambda Legal, Hate Crimes Bill Signed Into Law (Oct. 28, 2009), available at http://www.lambdalegal.org/publications/articles/fa_20091028_president-signs-hate-crimes-bill-into-law.html.

73. See Lazin, *supra* note 66, at 8.

74. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

75. See N.H. REV. STAT. ANN. § 457:1-a (2009).

76. See 15 VT. STAT. ANN. §§ 8, 1204 (2009).

Connecticut⁷⁸ in recognizing same-sex marriage.⁷⁹ California briefly (from June 16 to November 4, 2008) recognized same-sex marriages by virtue of a court decision from the California Supreme Court, but Proposition 8, a November 2008 referendum, passed by a slim margin to revoke the state's recognition of same-sex marriages.⁸⁰ In 2009, the California Supreme Court upheld Proposition 8 but ruled that same-sex marriages entered into before Proposition 8 was passed were still valid.⁸¹ California will also recognize same-sex marriages performed in other states or other countries between June 16, 2008 and November 4, 2008.⁸²

Other jurisdictions provided civil union and similar arrangements that fall short of marriage but provide many rights for same-sex couples. Nevada became the fifth U.S. jurisdiction to provide the equivalent of state-level spousal rights to same-sex couples,⁸³ following California (domestic partnerships in 1999, expanded in 2005),⁸⁴ the District of Columbia (domestic partnerships in 2002),⁸⁵ New Jersey (civil unions in 2007),⁸⁶ Oregon (domestic partnerships in 2008),⁸⁷ and Washington (domestic partnerships in 2007).⁸⁸ Finally, Colorado⁸⁹ and Wisconsin⁹⁰ joined Hawaii (reciprocal beneficiaries 1997)⁹¹ and Maine (2004)⁹² in providing some spousal rights to same-sex couples within the state.

Legislation to legalize same-sex marriage is pending in other states. Illinois legislators introduced the Religious Freedom and Marriage Fairness Act, which would define marriage as a union of two persons rather than as a union of a man and a woman.⁹³ Legislation is also pending in New Jersey⁹⁴ and other U.S. jurisdictions such as the District of Columbia, where a same-sex marriage bill was approved by the City Council on Decem-

77. See *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004).

78. See *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407 (Conn. 2008).

79. HUMAN RIGHTS CAMPAIGN, MAP: MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS (2009), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

80. Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Voters approve Proposition 8 banning same-sex marriages*, L.A. TIMES, Nov. 5, 2008, <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page=1>.

81. See generally, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

82. Dan Smith, *Schwarzenegger Signs Gay Rights Bills*, SACRAMENTO BEE, Oct. 12, 2009, <http://www.sacbee.com/capitolandcalifornia/story/2248216.html>.

83. Cy Ryan, *With Veto Override, Domestic Partners Bill Becomes Law*, LAS VEGAS SUN, May 31, 2009, <http://www.lasvegassun.com/news/2009/may/31/veto-override-domestic-partners-bill-becomes-law/>.

84. See CAL. FAM. CODE § 297.

85. See D.C. LAW NOS. 9-114 (1992), 17-231 (2008).

86. See N.J. STAT. ANN. § 37:1-28; see also *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

87. See OR. REV. STAT. § 106.

88. See WASH. REV. CODE § 26.60.010.

89. See COLO. REV. STAT. § 24-50-603 (2009).

90. See WIS. STAT. § 770.

91. See HAW. REV. STAT. § 572C-1-C-7.

92. See 19-A ME. REV. STAT. ANN. § 701.

93. Status of Religious Freedom and Marriage Fairness Act, HB0178, 96th Gen. Assembly (Ill. 2009), available at <http://ilga.gov/legislation/billstatus.asp?DocNum=178&GAID=10&GA=96&DocTypeID=HB&LegID=40195&SessionID=76>.

94. See Geoff Mulvihill, *Gay Marriage Bill Debated in NJ Committee*, CHICAGO FREE PRESS, Dec. 10, 2008, at 13.

ber 15.⁹⁵ The D.C. bill is subject to a thirty-day Congressional review period upon signature of Mayor Adrian Fenty, which was expected at the time of this writing.⁹⁶

There appears to be a trend in the Northeast region of the U.S. toward recognition of same-sex couples under the law—whether under a civil unions or marriage regime—and in the West toward domestic partnership benefits that are equal to those granted to heterosexual married couples. Whether these and the judicial victory in Iowa are predictors of the entire nation's willingness to accept same-sex relationship recognition remains to be seen.⁹⁷

Outside the U.S., trends toward relationship recognition resemble a similar patchwork. Norway⁹⁸ and Sweden⁹⁹ joined Belgium (2003),¹⁰⁰ Canada (2005),¹⁰¹ The Netherlands (2001),¹⁰² Spain (2005),¹⁰³ and South Africa (2006)¹⁰⁴ in recognizing same-sex marriages.

In November 2009, an Argentine judge, Gabriela Seijas, ruled that the civil registry of Buenos Aires must confirm the marriage of a same-sex couple before her court (Buenos Aires has recognized civil unions since 2002); however, a national judge filed an injunction blocking the marriage and requiring further review.¹⁰⁵ Civil unions are also recognized in Mexico City and Uruguay.¹⁰⁶ Uruguay also became the first Latin American country to recognize same-sex adoption in September.¹⁰⁷

As the year came to a close, a number of countries seemed poised to recognize same-sex marriages. In December, Portugal's newly elected Socialist government, for example, announced that it had "drawn up a proposal" that, if enacted, would make that country the sixth European country to allow gay marriage.¹⁰⁸ According to news sources, "[t]he law is almost certain to pass" because the current Portuguese government enjoys the support of

95. Tim Craig, *D.C. Council Approves Same-sex Marriage Bill*, WASH. POST, Dec. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121500945.html?hpid=topnews>.

96. *Id.*

97. See generally Wojcik, *supra* note 77.

98. Tony Grew, *Norway Legalises Gay Marriage*, PINK NEWS, June 11, 2008, <http://www.pinknews.co.uk/news/articles/2005-7926.html> (Norway's same-sex marriage law became effective January 1, 2009.).

99. *Sweden Allows Same-sex Marriage*, BBC NEWS EUROPE, Apr. 2, 2009, <http://news.bbc.co.uk/2/hi/7978495.stm>.

100. *Gay Marriage Around the Globe*, BBC NEWS AMERICAS, Dec. 22, 2005, <http://news.bbc.co.uk/2/hi/4081999.stm>.

101. *Id.*

102. *Id.*

103. *Id.*

104. Clare Nullis, *Same-Sex Marriage Law Takes Effect in S. Africa*, WASH. POST, Dec. 1, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html>.

105. *Latin America's First Gay Marriage Halted*, CNN WORLD, Dec. 1, 2009, <http://www.cnn.com/2009/WORLD/americas/11/30/argentina.gay.marriage/index.html>.

106. *Uruguay Approves Gay Civil Unions*, BBC NEWS AMERICAS, Dec. 19, 2007, <http://news.bbc.co.uk/2/hi/americas/7151669.stm>.

107. *Uruguay Passes Same-sex Adoption Law*, CNN WORLD, Sept. 10, 2009, <http://www.cnn.com/2009/WORLD/americas/09/10/uruguay.gays/index.html>.

108. Barry Hatton, *Portuguese [Government] Aims to Permit Gay Marriage*, S.F. CHRONICLE, Dec. 17, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/12/17/international/i072355S82.DTL>.

a majority in Parliament.¹⁰⁹ The proposed legislation follows on the heels of a July 2009 decision by Portugal's Constitutional Court upholding the ban on gay marriage.¹¹⁰

Also, in December 2009, Ireland was considering a civil-partnership bill that would extend official governmental recognition to same-sex couples.¹¹¹ The proposed legislation has not, however, been embraced by many activists in the Irish LGBT community.¹¹² Among other things, detractors contend that the civil-partnership bill does not safeguard the rights of children with civil partnerships and that, because it fails to allow for marriage, it sends a message that the Irish "government do[es] not consider gay and lesbian relationships to be equal."¹¹³

Finally, the government of Nepal appears to have taken steps to comply with a 2008 Supreme Court ruling directing it to institute changes in the law that would guarantee equal rights for homosexuals.¹¹⁴ Although no same-sex marriage legislation has yet been drafted, in the summer of 2009 Nepal formed a commission to study same-sex marriage laws of other nations, presumably with the intent to craft a law of its own.¹¹⁵

III. Non-Discrimination

Most countries of the world have no laws that protect individuals against acts of discrimination based on their sexual orientation. In the United States, there is only the federal law protecting gay and lesbian persons from hate crimes motivated by their actual or perceived sexual orientation, but some greater protections can be found on a state-by-state level. Widespread discrimination remains an issue of great importance for LGBT people in all areas of the world. In the United States, only thirteen U.S. states (California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia have policies to protect LGBT people from discrimination in employment based on sexual orientation *and* gender identity,¹¹⁶ while seven states (Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin) prohibit employment discrimination based solely on sexual orientation.¹¹⁷ Eight other states (Arizona, Indiana, Kansas, Ohio, Michigan, Montana, Pennsylvania, and Virginia) protect public employees from discrimination based on sexual orientation and/or gender identity.¹¹⁸

109. *Id.*

110. Barry Hatton, *Portugal Gay Marriage Ban Upheld By Court*, HUFFINGTON POST, July 31, 2009, http://www.huffingtonpost.com/2009/07/31/portugal-gay-marriage-ban_n_248743.html.

111. Rex Wockner, *World News Briefs*, GAY & LESBIAN TIMES, Dec. 17, 2009, <http://www.gaylesbiantimes.com/?id=15994&terms=irish,civil,partnership>.

112. *Irish LGBTs: Civil Unions Aren't Enough*, ADVOCATE.COM, Dec. 9, 2009, <http://www.advocate.com/article.aspx?id=103907>.

113. *Id.*

114. Mallika Aryal, *Queering the Pitch—Celebration Over Nepal's Same-Sex Marriage Legislation Is A Little Bit Premature*, NEPALI TIMES, July 24, 2009, available at 2009 WLNR 14376720.

115. *Nepal MP Offers Honeymoon Package to Gay Indian Prince*, THE TIMES OF INDIA, Dec. 2, 2009, <http://timesofindia.indiatimes.com/world/south-asia/Nepal-MP-offers-honeymoon-package-to-gay-Indian-prince/articleshow/5292379.cms>.

116. *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN, Sept. 2, 2009, http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (map).

117. *Id.*

118. *Id.*

Federal non-discrimination legislation (the Employment Non-Discrimination Act, ENDA) was again introduced in the U.S. Congress.¹¹⁹ Legislation was also introduced to end the "Don't Ask, Don't Tell" policy that allows the U.S. military to continue to discriminate against gay and lesbian persons serving in its armed forces.¹²⁰ But although the bills were introduced, it is far from certain that either bill will be passed in the near term.¹²¹

In countries where members of the LGBT community are not protected by legislation specifically banning discrimination on the basis of sexual orientation, plaintiffs continue to use the court system in an attempt to ensure non-discriminatory treatment. For example, the European Court of Human Rights has consolidated a number of cases arising from the refusal of Moscow's mayor to allow Gay Pride events in the Russian city.¹²² The mayor, Yuri Luzhkov, has justified the bans on security grounds, but it seems fairly certain that these decisions are grounded in his own homophobia, as Luzhkov is on record as describing homosexuality as "satanic"¹²³ and gay people as "weapons of mass destruction."¹²⁴ Under the European Court's most recent order in *Alekseyev v. Russia*, authorities have until January 20, 2010 to file a response.¹²⁵ Similarly, those opposed to equal treatment have also sought to use the court system to escape strictures imposed by equal rights laws. A recent example involves a British public employee who refused to register same-sex civil partnerships on the grounds that it violated her religious belief that same-sex unions were "contrary to God's instructions."¹²⁶ In its ruling,¹²⁷ the Court of Appeals said that "human rights law . . . puts the rights of homosexuals before the rights of Christians to hold to their beliefs."¹²⁸

IV. Immigration and Asylum

A. HIV STATUS

On October 30, 2009, U.S. President Barack Obama announced that the travel ban on those living with HIV would be lifted after a two-month waiting period.¹²⁹ This means

119. Lisa Leff, *Gay House Members Say Gay-Friendly Bills Are Near*, CHICAGO FREE PRESS, Dec. 10, 2009, at 9.

120. Elizabeth Williamson & Neil King, Jr., *Support Grows to End "Don't Ask, Don't Tell"*, WALL ST. J., Oct. 12, 2009, http://online.wsj.com/article/SB125522141307378387.html?mod=rss_Today's_Most_Popular.

121. Jillian T. Weiss, *Is ENDA Dead for the Year?*, THE BILERICO PROJECT, Dec. 2, 2009, http://www.bilerico.com/2009/12/guess_whats_on_next_weeks_markup_schedule.php.

122. *European Court of Human Rights Gives Russia Four Months to Answer Moscow Gay Pride Bans*, GAY RUSSIA, Oct. 7, 2009, <http://gayrussia.ru/en/news/detail.php?ID=14296> [hereinafter *Moscow Gay Pride Bans*].

123. David Nowak, *Moscow Police Break Up Banned Gay Rights Rallies*, HOUSTON CHRONICLE, May 17, 2009, available at 2009 WLNR 9474248.

124. *Gay Parades "Satanic": Moscow Mayor*, CHARLESTON DAILY MAIL, Oct. 14, 2009.

125. *Moscow Gay Pride Bans*, *supra* note 122.

126. Steve Doughty, *Judge Expresses Sympathy for Christian Registrar Sacked for Refusing to Marry Gay Couples*, DAILY MAIL, Dec. 16, 2009, <http://www.dailymail.co.uk/news/article-1236042/Christian-registrar-loses-sacking-fight-refusal-marry-gay-couples.html>.

127. *Ladele v. The London Borough of Islington*, [2009] EWCA (Civ) 1357 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>.

128. Doughty, *supra* note 126.

129. *U.S.: Obama Announces End to HIV Travel Ban*, HUMAN RIGHTS WATCH, Oct. 30, 2009, <http://www.hrw.org/en/news/2009/10/30/us-obama-announces-end-hiv-travel-ban>.

that in 2010 HIV-positive status will no longer be a roadblock to entry into the United States, whether for temporary visits, long-term asylum, or immigration status.

B. POLITICAL ASYLUM

Individuals who reasonably fear persecution based on their sexual orientation can file political asylum claims in the United States, pursuant to the United Nations Convention Relating to the Status of Refugees and the Protocol to that Convention.¹³⁰ Sexual orientation falls under the “social group” category.¹³¹ According to *NEWSWEEK*, the number of individuals seeking asylum in the United States because of persecution based on sexual orientation has increased.¹³² The government does not keep figures differentiating the reasons people seek asylum, but the reported spike in the numbers relating to gay asylum seekers is based on anecdotal evidence furnished by NGOs representing immigrants and sexual minorities.¹³³

Other countries also recognize discrimination based on sexual orientation as a basis for claiming asylum. In a case that surprised many U.S. observers, the Federal Court in Canada ruled that a twenty-one-year-old lesbian who was a member of the U.S. Army could allege fear of persecution in the United States because of her sexual orientation.¹³⁴ Concerns have been raised, however, that some countries are failing to appropriately address the needs of LGBT asylum-seekers. For example, the Scottish National Party passed a resolution condemning the United Kingdom for “consistently [turning] a blind eye to homophobic persecution abroad.”¹³⁵ One asylum case that gained widespread attention in the United Kingdom involved a lesbian claimant who fled Iran after her girlfriend was arrested and sentenced to death by stoning.¹³⁶ Initially, the United Kingdom had rejected the claim, but after intense pressure from LGBT and immigration NGOs, the government agreed to review the denial and ultimately granted asylum in February.¹³⁷ Turkey has also been singled out as an “unsafe haven” for LGBT asylum seekers.¹³⁸ A joint report

130. UNHCR: THE UN REFUGEE AGENCY, UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER DISCRIMINATION (2008), <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>.

131. See MIDWEST HUMAN RIGHTS PARTNERSHIP FOR SEXUAL ORIENTATION & THE LESBIAN AND GAY IMMIGRATION RIGHTS TASK FORCE, PREPARING SEXUAL ORIENTATION-BASED ASYLUM CLAIMS: A HANDBOOK FOR ADVOCATES AND ASYLUM SEEKERS (2000), <http://www.asylumlaw.org/docs/sexualminorities/handbookpart1.pdf>.

132. Krista Geseman, *Desperately Seeking Freedom*, *NEWSWEEK*, Nov. 20, 2009, www.newsweek.com/id/224893.

133. *Id.*

134. *Smith v. Minister of Citizenship and Immigration*, [2009] F.C. 1194 (Can.), available at <http://www.unhcr.org/refworld/docid/4b3c7b8c2.html>. See also Ian Austen, *Canada: Court Orders Refugee Board to Consider ‘Don’t Ask, Don’t Tell’ in Army Deserter’s Case*, *N.Y. TIMES*, Nov. 20, 2009, at A6, available at <http://www.nytimes.com/2009/11/21/world/americas/21briefs-Canada.html?emc=mt&ntemail=y>.

135. *SNP Criticizes UK Government Over Gay and Lesbian Asylum Seekers*, *PINK NEWS*, Oct. 19, 2009, www.pinknews.co.uk/1009/10/19/snp-criticizes-uk-government-over-gay-and-lesbian-asylum-seekers.

136. Robert Verkaik, *Asylum for Lesbian on the Run from Iran*, *THE INDEP.*, Feb. 16, 2009, available at 2009 WLNR 2991501.

137. *Id.*

138. HELSINKI CITIZENS’ ASSEMBLY & ORAM, UNSAFE HAVEN: THE SECURITY CHALLENGES FACING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ASYLUM SEEKERS & REFUGEES IN TURKEY 5 (2009), available at http://www.hyd.org.tr/staticfiles/files/unsafe_latest.pdf.

compiled by three NGOs (the Helsinki Citizens Assembly, the Turkey Refugee Advocacy and Support Program, and the Organization for Refuge, Asylum, and Migration) drew on forty-six in-depth interviews with LGBT asylum-seekers (primarily Iranian), highlighting the difficulties these individuals face, as well as inappropriate and counterproductive behavior by staff members of the United Nations High Commissioner for Refugees and the Turkish Ministry of Interior who marginalize LGBT claimants' testimonies.¹³⁹ Similarly, in Australia, the Refugee Review Tribunal was criticized by the Australia High Court for having engaged in inappropriate behavior when it denied an asylum claim by a Bangladeshi gay man; the High Court concluded that the tribunal was biased against the gay claimant.¹⁴⁰ On a more positive note, some sources indicate that France is increasingly receptive to asylum claims made by members of sexual minorities; according to one report, the "number of successful applications for gay asylum seekers in France is about fifteen percent above average of successful applications in the general population[.]"¹⁴¹

V. OTHER DEVELOPMENTS

In March 2009, the U.S. State Department reported: "The United States supports the UN Statement on 'Human Rights, Sexual Orientation, and Gender Identity,' and is pleased to join the other 66 UN member states who have declared their support of this Statement that condemns human rights violations based on sexual orientation and gender identity wherever they occur."¹⁴² The U.N. statement calls for global decriminalization of homosexuality and homosexual conduct.¹⁴³

In June 2009, Congress approved the Foreign Relations Authorization Act for Fiscal Years 2010-11.¹⁴⁴ In pertinent part, the bill requires the U.S. State Department to create one or more positions within the Human Rights Bureau to monitor international LGBT concerns; to use diplomacy to encourage countries to repeal or reform laws that criminalize homosexuality or consensual homosexual conduct; to improve reporting on LGBT human rights issues, with emphasis on transgender issues; and to include LGBT issues in human rights training courses for Foreign Service Officers.¹⁴⁵

In November 2009, Thailand issued rules making it more difficult for individuals to undergo sex change operations.¹⁴⁶ The rules require a year-long waiting period between

139. *Id.*

140. Michael Pelly, *Judge Blasts 'Biased' Refugee Tribunal*, AUSTRALIAN, Sept. 28, 2009, available at 2009 WLNR 19053675.

141. Jerina Messie, *More Gay Africans Seek Asylum Abroad*, BEHIND THE MASK, Nov. 30, 2009, www.mask.org.za/article.php?cat=AfricaAbroad%id=2440.

142. Press Release, U.N. Bureau of Public Affairs, UN Statement on "Human Rights, Sexual Orientation, and Gender identity" (Mar. 18, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/03/120509.htm>.

143. See *Human Rights: Statement on Human Rights, Sexual Orientation, and Gender Identity at High Level Meeting*, PERMANENT MISSION OF THE KINGDOM OF THE NETHERLANDS TO THE UNITED NATIONS, <http://www.netherlandsmission.org/article.asp?articleref=AR00000530EN> (last visited Dec. 18, 2008).

144. Foreign Relations Authorization Act 2010-2011, H.R. 2410, 111th Cong. (1st Sess. 2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2410>.

145. *The U.S. House of Representatives Passes State Department Authorization Bill (HR 2410)*, COUNCIL FOR GLOBAL EQUALITY, June 10, 2009, http://www.globalequality.org/index.php?option=com_content&task=view&id=80&Itemid=86%20.

146. Jane Fugal, *Thailand Looks to Limit Sex Change Surgery*, WA TODAY, Nov. 27, 2009, <http://www.watoday.com.au/world/thailand-looks-to-limit-sex-change-surgery-20091127-jvix.html>.

the application for the operation and the procedure; candidates must also wear opposite-sex clothing for a year prior to undergoing the sex-change.¹⁴⁷ The rules allow for exemptions if the candidate can establish a long history of cross-dressing.¹⁴⁸ Some members of Thailand's LGBT community welcomed the changes. One advocate noted that the new regulations were a necessary safeguard that would help reduce the number of individuals who undergo a sex change only to subsequently regret the decision.¹⁴⁹

147. *Id.*

148. *Id.*

149. *New Thai Laws Crack Down on Changing Sex*, NORTHERN TERRITORY NEWS (Nov. 29, 2009), *available at* 2009 WLNR 24132969.

